

COMMISSIONERS
TOM FORESE - Chairman
BOB BURNS
DOUG LITTLE
ANDY TOBIN
BOYD DUNN

ORIGINAL



**ARIZONA CORPORATION
COMMISSION**



0000180603

Boyd Dunn
Commissioner

Direct Line: (602) 542-3935
E-mail: dunn-web@azcc.gov

June 20, 2017

**Re: Special Open Meeting re: Motions Filed in the APS Rate Case
(Docket Nos. E-01345A-16-0036 and E-01345A-16-0123)**

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Dear Mr. Chairman, Commissioners, and Interested Parties,

Attached to this letter is a proposed interlocutory order for the Commission's consideration. As my fellow Commissioners know, our Hearing Division have a conflict that precludes them from preparing and revising a recommended order and opinion. Since I routinely dealt with discovery motions and recusal in my role as a judge, I have taken on the burden of crafting an initial draft. I hope we can use this as roadmap to guide us through the consideration and discussion today.

The motions before us present a complex web of legal, political, and policy considerations. I have conducted an extensive review of the pleadings, the transcripts, the related dockets, the statements, and the relevant legal authority in preparing for today. My draft reflects that preparation by laying out the history of this dispute, summarizing the positions of the movant and APS, discussing the legal issues raised, and providing a proposed resolution for each motion.

Sincerely,

A handwritten signature in black ink, appearing to read "Boyd Dunn".

Boyd Dunn
Commissioner and Chairman of the Ethics Committee

Arizona Corporation Commission

DOCKETED

JUN 20 2017

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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 TOM FORESE – Chairman
4 BOB BURNS
5 DOUG LITTLE
6 ANDY TOBIN
7 BOYD W. DUNN

8 IN THE MATTER OF THE APPLICATION OF
9 ARIZONA PUBLIC SERVICE COMPANY FOR A
10 HEARING TO DETERMINE THE FAIR VALUE OF
11 THE UTILITY PROPERTY OF THE COMPANY
12 FOR RATEMAKING PURPOSES, TO FIX A JUST
13 AND REASONABLE RATE OF RETURN
14 THEREON, TO APPROVE RATE SCHEDULES
15 DESIGNED TO DEVELOP SUCH RETURN.

DOCKET NO. E-01345A-16-0036

DECISION NO. _____

11 IN THE MATTER OF FUEL AND PURCHASED
12 POWER PROCUREMENT AUDITS FOR
13 ARIZONA PUBLIC SERVICE COMPANY.

DOCKET NO. E-01345A-16-0123

INTERLOCUTORY ORDER
(Discovery Motions)

14 Special Open Meeting
15 June 20, 2017
16 Phoenix, Arizona

16 **BY THE COMMISSION:**

17 This issue concerns several pending motions offered by Commissioner Robert Burns
18 (“Commissioner Burns”) in the above-captioned Arizona Public Service Company’s (“APS”) application to determine the fair value of the utility property of the Company for ratemaking
19 purposes, to fix a just and reasonable rate of return thereon, and to approve rate schedules designed to
20 develop such return filed on June 1, 2016, with the Arizona Corporation Commission
21 (“Commission”), and consolidated with Docket No. E-01345A-16-0123 on August 1, 2016. These
22 motions (collectively, the “Motions”) include: (I) Commissioner Burns’ Motion for Determination of
23 Disqualification and for Stay of Proceedings Pending Full Investigation (April 27, 2017) (“Motion
24 for Disqualification”), (II) Emergency Motion of Commissioner Robert Burns to Compel Compliance
25 with Investigatory Subpoenas (June 2, 2017) (“Motion to Compel”), (III) Emergency Motion of
26 Commissioner Robert Burns for Relief (1) Confirming That the Administrative Law Judge Will
27
28

1 Facilitate Calling and Questioning of Hearing Witnesses; and (2) Approval of His Counsel
2 Participating in Questioning (April 26, 2017) ("Motion to Question and Admit Counsel to
3 Question"), and (IV) Emergency Renewed Motion of Commissioner Robert Burns for Relief Staying
4 These Rate-Making Proceedings (June 2, 2017) ("Motion to Stay").

5 Parties to this matter are APS, the Commission's Utilities Division ("Staff"), Richard Gayer,
6 Patricia Ferré, Warren Woodward, IO Data Centers, LLC ("IO"), Freeport Minerals Corporation
7 (Freeport"), Arizonans for Electric Choice and Competition ("AECC"), Sun City Home Owners
8 Association ("Sun City I-IOA"), Western Resource Advocates ("WRA"), Arizona Investment
9 Council ("AIC"); Arizona Utility Ratepayer Alliance ("AURA"); Property Owners and Residents
10 Association of Sun City West ("PORA"), Arizona Solar Energy Industries Association ("AriSEIA"),
11 Arizona School Boards Association ("ASBA") and Arizona Association of School Business Officials
12 ("AASBO") (collectively "ASBA/AASBO"); Cynthia Zwick, Arizona Community Action
13 Association ("ACAA"); Southwest Energy Efficiency Project ("SWEEP"); the Residential Utility
14 Consumer Office ("RUCO"), Vote Solar; Electrical District Number Eight and McMullen Valley
15 Water Conservation & Drainage District (collectively, "ED8/McMullen"), The Kroger Co.
16 ("Kroger"), Tucson Electric Power Company ("TEP"); Pima County; Solar Energy Industries
17 Association ("SEIA"), the Energy Freedom Coalition of America ("EFCA"), Wal-Mart Stores, Inc.
18 and Sam's West, Inc. (collectively, "Walmart"); Local Unions 387 and 769 of the International
19 Brotherhood of Electrical Workers, AFL-CIO (collectively, "the IBEW Locals"); Calcine Energy
20 Solutions LLC ("Calcine Solutions")(formerly Noble Energy Solutions, LLC), the Arizona
21 Competitive Power Alliance ("the Alliance"), Electrical District Number Six, Pinal County, Arizona
22 ("ED 6"), Electrical District Number Seven of the County of Maricopa, State of Arizona ("ED7"),
23 Aguila Irrigation District ("AID"), Tonopah Initiation District ("TID"), Harquaddala Valley Power
24 District ("I-IVPD"), and Maricopa County Municipal Water Conservation District Number One
25 ("MWD") (collectively, "Districts"), the Federal Executive Agencies ("FEA"), Constellation New
26 Energy, Inc. ("CNE"), Direct Energy, Inc. ("Direct Energy"), AARP, the City of Sedona ("Sedona");
27 Arizona Solar Deployment Alliance ("ASDA"); the City of Coolidge ("Coolidge"), REP America

28

d/b/a ConservAmerica ("ConservAmerica"), and Granite Creek Power & Gas and Granite Creek Farms LLC (collectively, "Granite Creek").

DISCUSSION

I. Background

The Motions are the most recent development in a longstanding discovery dispute between APS and Commissioner Burns. APS is a public service corporation principally engaged in furnishing electricity in the state of Arizona. APS is the largest subsidiary of Pinnacle West Capital Corporation and the largest electricity provider in Arizona serving more than 1.2 million customers in 11 of Arizona's 15 counties. APS also generates, sells, and delivers electricity to wholesale customers in the western United States. Commissioner Burns was first elected to the Arizona Corporation Commission in 2012 and reelected to a second term in 2016. Commissioner Burns is one of five statewide elected officials serving on the Commission. Staff and intervenors did not participate in briefing the Motions.

A. The Origins of Commissioner Burns' Discovery Dispute with APS

The conflict between Commissioner Burns and APS can be traced back to a 2015 generic docket created by Commissioners Burns and Susan Bitter Smith¹ ("Commissioner Bitter Smith") to explore the campaign contribution practices of public service corporations in response to perceived public "suspicion and mistrust" of the Commission.² Initially, these Commissioners asked public service corporations and unregulated entities who appear before the Commission to voluntarily refrain from directing independent expenditures at candidates for the Commission.³ Over the years, Commissioner Burns has broadened the scope of this initial request and pursued the information from APS through a variety of procedural avenues including generic dockets, APS's Commission cases, and civil proceedings. His most recent demand asks APS to produce information detailing its political spending, campaign contributions, lobbying expenses, charitable contributions, marketing expenses,

¹ Susan Bitter Smith was Chair of the Commission at the time the above referenced docket was opened. For the purposes of this Decision, and in the interest of clarity and continuity, only the current Chairman, Tom Forese, will be identified as Chairman of the Commission. Former Chairpersons are identified as Commissioners.

² See Correspondence from Commissioner Burns to Outside Parties, Docket No. AU-00000A-15-0309 (Nov. 30, 2015).

³ *Id.*

1 and sponsorship costs for the years 2011 through 2016. Commissioner Burns insists this information
 2 is vital to resolving the APS rate case. The Motions are his latest effort to acquire the information
 3 from APS.

4 **B. Commissioner Burns' Initial Attempts to Collect Information from APS**

5 In response to Commissioners Burns and Bitter Smith's, APS filed a letter in the new generic
 6 docket objecting to the voluntary request as a violation of the Company's First Amendment rights. In
 7 its objection, Donald Brandt, CEO for Pinnacle West, ("Mr. Brandt") stated that "APS does not
 8 recover from customers the cost of any political contributions."⁴ Commissioner Burns replied to APS
 9 and demanded a "full report[] of any campaign contributions and indirect contributions to third-party
 10 organizations" made during the 2014 election cycle.⁵

11 Commissioners Burns and Bitter Smith were not the only voices heard on the issue. Chairman
 12 Tom Forese ("Chairman Forese") noted that any request to refrain from political contributions would
 13 "have severe implications to civil liberties."⁶ Commissioner Doug Little ("Commissioner Little")
 14 suggested that attempts to subpoena campaign finance records would have "constitutional and
 15 practical problems" and focusing on APS, while excluding other similarly situated entities, is
 16 "inherently unfair and would lead to an incomplete picture of what actually was going on in the 2014
 17 elections."⁷

18 Since 2015, Commissioner Burns has responded to APS's refusal to produce the information
 19 with increasing severity. In January 2016, Commissioner Burns decided "to broaden [his] inquiry to
 20 include funds expended on all political contributions, lobbying, and charitable contributions, *i.e.*, all
 21 donations made — either directly or indirectly — by APS or under APS's brand name for any
 22 purpose."⁸ At the April 2016 Open Meeting, Commissioner Burns stated "I am voting no on this item
 23 and will not support any further action items requested by APS with the exception of an item that
 24

25 ⁴ Mr. Brandt's Letters to Commissioner Burns, Docket No. AU-00000A-15-0309 (Oct. 23 and Dec. 30, 2015).

26 ⁵ Correspondence from Commissioner Burns to Outside Parties, Docket No. AU-00000A-15-0309 (Nov. 30, 2015).

27 ⁶ Correspondence from Chairman Forese, Docket No. AU-00000A-15-0309 (Sept. 4, 2015).

28 ⁷ Correspondence from Commissioner Little, Docket No. AU-00000A-15-0309 (Sept. 11, 2015).

⁸ Correspondence from Commissioner Burns, Docket No. AU-00000A-15-0309 (Jan. 28, 2016).

1 might have health or safety components until the Commission order that rests at the APS corporate
2 office is complied with in its entirety.”⁹

3 By the summer of 2016, Commissioner Burns sought out yet another route to the information
4 when he asked the Commission to authorize the retention of an attorney to conduct an investigation
5 into political contributions in Commission elections. He continued to be concerned with the
6 reputation of the Commission and believed an investigation was a way “to at least have some
7 information available for people out there to understand what’s going on [with this regulated
8 entity].”¹⁰ Commissioner Burns wanted to investigate “potential undue influence on the
9 Commissioners . . . in the future.”¹¹ When pressed for proof that an investigation was warranted,
10 Commissioner Burns could not point to any evidence, but argued that “a lot of people” told him that
11 it was “not a wild goose chase and that I should proceed.”¹² He urged the Commission to “[g]ive
12 [him] this investigator and I might be able to find that evidence.”¹³

13 His proposal was met with resistance from the rest of the Commission. Several
14 Commissioners felt Commissioner Burns had “been accusing [Chairman Forese and Commissioner
15 Little] of being under the undue influence of [APS].” Commissioner Burns responded stating, “that is
16 an absolute lie.”¹⁴ and he “did not challenge [the Commissioners’] integrity. [He] challenge the
17 integrity of APS.” He went on to say “[w]hen I speak to a group, I tell them that [Chairman Forese
18 and Commissioner Little] were unaware of where that money came from until after the election, just
19 like everybody else, that you had no [] knowledge of where that money was coming from.”¹⁵

23 ⁹ Open Mtg. Tr. at 12-13 (Item No. 27), Docket No. E-01345A-11-0224 (Apr. 12-13, 2016), available in Motion to
Quash, or, in the Alternative, to Decline to Hear (“Motion to Quash”) at Ex. J (Sept. 9, 2016).

24 ¹⁰ Staff Mtg. Tr. at 13-14, 19 (Item No. 3), Docket No. AU-00000E-16-0270 (Aug. 10, 2016), available in Motion to
Quash at Ex. L (Sept. 9, 2016).

25 ¹¹ *Id.* at 32.

26 ¹² *Id.* at 30.

27 ¹³ *Id.*

28 ¹⁴ *Id.* at 17.

¹⁵ *Id.* at 18-19.

1 Commissioner Burns believed “APS is the one that’s put the cloud over this Commission and over
2 [Commissioners’] candidacy” and not Chairman Forese and Commissioner Little.¹⁶

3 The Commissioners also raised legal concerns with pursuing his investigation. Commissioner
4 Bob Stump (“Commissioner Stump”) noted that it is legal for a utility spend dark money to affect the
5 outcome of an election. He stated, “it may not be nice. But to the best of my understanding, only
6 changing the law will prevent it from happening again. And as far as I know, there’s absolutely
7 nothing that we, as Commissioners, can do to prevent anyone from spending money in races for the
8 Commission, short of changing the law.”¹⁷ Commissioner Stump also questioned the logic
9 underpinning the investigation stating, “let’s say we prove that the utility spent it, fine. There’s still
10 no nexus to that spending to the character of [Chairman Forese and Commissioner Little] or any other
11 [C]ommissioners.”¹⁸ Commissioner Little worried that the investigation could infringe on APS’s
12 protected speech rights.¹⁹ Chairman Forese was concerned that there was a political motivation
13 behind the investigation.²⁰ The Commission ultimately declined to fund the investigation.

14 **C. The Subpoenas and Prehearing Rate Case Proceedings**

15 On August 25, 2016, Commissioner Burns issued two subpoenas commanding APS, Pinnacle
16 West, and Mr. Brandt to appear and provide testimony on October 6, 2016. The subpoenas further
17 ordered APS, Pinnacle West, and Mr. Brandt to produce documents and information including each
18 charitable contribution, political contribution, lobbying expenditure, marketing/advertising
19 expenditure, 501(c)(3) and 501(c)(4) expenditure made by APS or Pinnacle West for the years 2011
20 through 2016.²¹

21 APS responded to the subpoenas by producing “all nonconfidential documents in its
22 possession that are responsive to the subpoena” and agreed to “produce any remaining responsive
23 documents in its possession that are confidential after an appropriate confidentiality agreement is

24 ¹⁶ *Id.* at 30.

25 ¹⁷ *Id.* at 11.

26 ¹⁸ *Id.* at 44-45.

27 ¹⁹ *Id.* at 34.

28 ²⁰ *Id.* at 17.

²¹ Correspondence from Commissioner Burns, Attachment A (Aug. 25, 2016).

1 signed.”²² APS also filed a Motion to Quash, or, in the Alternative, to Decline to Hear (Sept. 9, 2016)
2 in the docket and a Complaint for Declaratory Judgment in the Maricopa County Superior Court Case
3 No. CV2016-014895 (“*APS v. Commissioner Burns*”).²³ APS and Commissioner Burns engaged in
4 several months of negotiations, but could not reach a settlement.

5 At the close of 2016, the Pinnacle West Board adopted a revised political participation policy
6 that expanded voluntary disclosure of political expenditures on a going-forward basis. In addition, the
7 policy also requires annual disclosure from Pinnacle West of its “political contributions, payments to
8 trade associations that may have been used for lobbying-related or other political activities,
9 contributions to 501(c)(3) or 501(c)(4) organizations that may have used some of the proceeds for
10 lobbying-related or political activities permitted by law, and independent political expenditures made
11 by Pinnacle West.”²⁴

12 By February 2017, Commissioner Burns claims he still had not received a satisfactory
13 response from APS so he changed tactics once again and opened a new docket entitled ‘Development
14 of New Transparency and Disclosure Rules related to Financial Expenditures by Regulated
15 Monopolies, Intervenors and other Stakeholders’ (“T&D”).²⁵ According to Commissioner Burns, the
16 T&D docket would study and rectify “problems regarding financial contributions from regulated
17 monopolies or other stakeholders who may appear before the [Commission] that may directly or
18 indirectly benefit an ACC candidate, the sitting commissioner or key ACC staff.”²⁶ The subpoenas
19 were refiled in the T&D docket and Commissioner Burns stated this latest investigation would
20 include obtaining responses from APS.²⁷ In response, APS noticed a voluntary dismissal of *APS v.*
21 *Commissioner Burns* on March 8, 2017 and filed a Renewed Motion to Quash on March 10, 2017.

22
23
24 ²² APS Ltr. to Commissioner Burns (Sept. 9, 2016).

25 ²³ *Id.* In addition to the Complaint, APS also filed an Application for Preliminary Injunction and an Application for
Order to Show Cause in Maricopa County Case No. CV2016-014895.

26 ²⁴ Renewed Motion to Quash at 12 (Mar. 10, 2017).

27 ²⁵ Correspondence from Commissioner Burns at 1, Docket No. RU-00000A-17-0035 (Feb. 7, 2017).

28 ²⁶ *Id.*

²⁷ *Id.*

D. *Commissioner Burns v. APS, Maricopa County Case No. CV2017-001831*

On March 9, 2017, Commissioner Burns filed a Complaint seeking declaratory relief against APS in Maricopa County Superior Court Case No. CV2017-001831 ("*Commissioner Burns v. APS*"). APS filed a Motion to Dismiss on the grounds that the Commission had primary jurisdiction and Commissioner Burns failed to exhaust his administrative remedies. In his response, Commissioner Burns argues that his sweeping constitutional authority to investigate and concerns over Commissioner disqualification ensure the Complaint survives. The APS reply suggests that broad sweeping authority still must be seeking relevant information and the exhaustion of administrative remedies warrant dismissal. The Superior Court judge entered his Ruling that ordered a stay of the proceedings and found Commissioner Burns had not exhausted his administrative remedies and was required to file a Motion to Compel with the Commission before returning to his court.²⁸

II. Procedural History

On June 1, 2016, APS filed application to determine the fair value of the utility property of the Company for ratemaking purposes, to fix a just and reasonable rate of return thereon, and to approve rate schedules designed to develop such return.

On June 14, 2016, APS filed a Notice of Errata.

On June 23, 2016, APS filed its Second Notice of Errata.

On July 1, 2016, Staff issued a Letter of Sufficiency pursuant to Arizona Administrative Code ("A.A.C.") R14-2-103, classifying APS as a Class A utility.

On July 22, 2016, a Rate Case Procedural Order was issued setting the procedural schedule and associated procedural deadlines for this matter, granting several interventions, and granting several requests to receive service by email.

On August 1, 2016, a Procedural Order was issued granting Staff's request to consolidate the above-captioned dockets,²⁹ correcting typographical errors in the July 22, 2016 Rate Case Procedural Order, granting interventions, and granting requests to receive service by email.

²⁸ Correspondence from Commissioner Dunn, Ex. A (May 30, 2017).

²⁹ Docket No. E-01345A-16-0123 was opened on April 11, 2016.

1 On August 9, 2016, a Procedural Order was issued granting several interventions and
2 approved a consent to email service.

3 On August 25, 2016, Correspondence from Commissioner Bob Bums was filed in the docket.
4 The correspondence included subpoenas commanding production of documents and testimony from
5 APS, Pinnacle West Capital Corporation ("Pinnacle West"), and Mr. Brandt.

6 On September 9, 2016, APS filed correspondence regarding subpoenas dated August 25,
7 2016.

8 On September 9, 2016, APS filed a Motion to Sever.

9 On September 9, 2016, APS filed a Motion to Quash, or in the Alternative, to Decline to
10 Hear.

11 On September 12, 2016, APS filed correspondence objecting to the subpoenas.

12 On September 13, 2016, Correspondence from Commissioner Bob Bums was filed requesting
13 counsel be provided to defend him in *APS v. Commissioner Burns*, Maricopa County Superior Court
14 Case No. CV2016-012895.

15 On September 15, 2016, the Commission authorized Commissioner Burns to retain counsel to
16 defend him in the suit brought by APS.

17 On October 3, 2016, EFCA filed a Notice of Deposition of Barbara D. Lockwood.

18 On October 6, 2016, APS filed a Motion for Procedural Conference and Interim Protective
19 Order.

20 On October 12, 2016, EFCA filed its Response to Motion for Procedural Conference and
21 Interim Protective Order.

22 On October 14, 2016, a Procedural Order was issued granting APS's request for an interim
23 protective order regarding EFCA's October 3, 2016 Notice of Deposition, and setting a procedural
24 conference to be held on October 20, 2016 for the purpose of discussing discovery issues, including
25 but not limited to the deposition of APS witness Barbara D. Lockwood.

26 On November 17, 2016, a Procedural Order was issued granting intervention to AARP,
27 Sedona, and ASDA, granting requests for Service by Email, and setting procedural deadlines
28 regarding the deposition of APS witness Barbara Lockwood.

1 On November 23, 2016, a Procedural Order was issued granting intervention to Sunrun,
2 Coolidge, ConservAmerica, and Granite Creek.

3 On November 30, 2016, EFCA filed a Notice of Deposition of Barbara D. Lockwood. The
4 Notice indicated that EFCA and APS settled upon the date and time of the deposition, which will take
5 place on December 15, 2016, at 9:00 a.m.

6 On December 5, 2016, EFCA filed its Emergency Motion to Compel Production of Barbara
7 Lockwood Calendar in Advance of Lockwood Deposition.

8 On December 5, 2016, EFCA filed its Emergency Motion for Expedited Consideration
9 Regarding Emergency Motion to Compel Production of Barbara Lockwood Calendar in Advance of
10 Lockwood Deposition.

11 On December 7, 2016, APS filed its Response in Opposition to EFCA's Motion to Compel.

12 On December 7, 2016, APS filed its Motion to Compel.

13 On December 12, 2016, EFCA filed its Reply in Support of Emergency Motion to Compel
14 Production of Barbara Lockwood Calendar in Advance of Lockwood Deposition.

15 On December 29, 2016, APS filed its Notice of Intent of Revenue Requirement Settlement
16 Discussions.

17 On December 30, 2016, EFCA filed its Sur-Response to APS's Motion to Compel, Motion to
18 Strike Reply Brief; and Notice of Lodging Sur-Response.

19 On January 4, 2017, APS filed its Response to EFCA's Motion to Strike Reply Brief and
20 Notice of Lodging Sur-Response.

21 On January 5, 2017, APS filed a Motion for Protective Order.

22 On January 6, 2017, EFCA filed its Response to APS's Motion for Protective Order.

23 On January 6, 2017, EFCA filed its Emergency Motion for Expedited Consideration
24 Regarding EFCA's Response to APS's Motion for Protective Order.

25 On January 6, 2017, Staff filed its Notice of Time and Location for Settlement Discussions.

26 On January 13, 2017, a Procedural Order was issued denying Vote Solar's Motion to Strike;
27 and Granting APS's Motion for Protective Order in regard to EFCA's Notices of Deposition of APS
28 witnesses Leland R. Snook and Charles A. Miessner.

1 On January 18, 2017, EFCA filed its Motion for Reconsideration of the Approval of APS's
2 Motion for Protective Order.

3 On February 22, 2017, Commissioner Burns filed correspondence notifying the parties that he
4 had opened a new docket entitled, "Development of New Transparency and Disclosure Rules related
5 to Financial Expenditures by Regulated Monopolies, Intervenors and other Stakeholders" (Docket
6 No. RU-0000A-17-0035).

7 On March 1, 2017, Staff filed its Notice of Filing Settlement Term Sheet.

8 On March 9, 2017, Commissioner Burns filed a Complaint against APS with Maricopa
9 County Superior Court, *Commissioner Burns v. APS*, Case No. CV2017-001831.

10 On March 27, 2017, a Settlement Agreement was filed, signed by APS, Freeport, AECC,
11 RUCO, Sun City HOA, WRA, Vote Solar, ASBA, AASBO, AIC, AURA, PORA, AriSEIA, ACAA,
12 Kroger, SEIA, Calpine Solutions, CNE, Direct Energy, EFCA, the Alliance, Walmart, the IBEW
13 Locals, FEA, Sedona, ASDA, Granite Creek, Coolidge, ConservAmerica, and Staff.

14 On March 30, 2017, APS filed a Motion to Dismiss Commissioner Burns' Complaint in
15 *Commissioner Burns v. APS*.

16 On April 14, 2017, a Protective Order was issued to govern the treatment of the Joint Solar
17 Cooperation Agreement between APS and the solar parties. In general, the JSCA provides that its
18 signatories will refrain from seeking to undermine the Settlement Agreement through ballot
19 initiatives, legislation or advocacy at the Commission.

20 On April 18, 2017, Commissioner Burns filed his Response to the Motion to Dismiss in
21 *Commissioner Burns v. APS*.

22 On April 20, 2017, a Prehearing Conference was held to schedule witnesses and plan trial.
23 Commissioner Burns attended and notified the parties that he "will be submitting additional questions
24 to be answered by APS and will be advising the administrative law judge that I believe APS will need
25 to produce witnesses not currently listed to answer my additional questions." He indicated he "will be
26 present on [April 27, 2017]" to ask questions of APS witnesses.³⁰

27
28 ³⁰ Prehearing Conf. Tr. vol. I, 17, 43-44, 48, 52-53 (Apr. 20, 2017).

1 On April 21, 2017, Commissioner Burns filed a list of witnesses and subjects of testimony he
2 intended to question.

3 On April 24, 25, 26, 27, and 28, 2017, and May 1 and 2, 2017, the evidentiary hearing in this
4 matter was held before a duly authorized Administrative Law Judge of the Commissioners, at the
5 Commission's offices in Phoenix, Arizona.

6 On April 24, 2017, Commissioner Burns filed his Request for Questioning of APS and
7 Pinnacle West Witnesses.

8 On April 24, 2017, Mr. Bill Richards spoke "on behalf of Commissioner Robert Burns" to
9 discuss the questioning of APS witnesses.³¹

10 On April 24, 2017, Administrative Law Judge Jibilian instructed the parties that "[t]he
11 Hearing Division will deferred to the Commission as a body for its consideration and determination
12 on the dispute. And to facilitate that process, I will ask that any motions by any party any comments
13 by any Commissioner or Commissioner representatives relating to the dispute between
14 Commissioners should be made in writing in this docket."³²

15 On April 26, 2017, Commissioner Burns filed his Motion to Question and Admit Counsel to
16 Question.

17 On April 26, 2017, APS filed its Objection to Commissioner Burns' Demand for Testimony.

18 On April 27, 2017, Commissioner Burns did not appear to question APS witnesses.³³

19 On April 28, 2017, Commissioner Burns filed his Motion for Disqualification.

20 On May 1, 2017, APS filed its Reply to Commissioner Burns' Response to the Motion to
21 Dismiss in *Commissioner Burns v. APS*.

22 On May 4, 2017, APS filed the Declaration of Barbara Lockwood to supplement her
23 testimony and respond to Commissioner Burns' April 24, 2017 questions.

24 On May 12, 2017, Commissioner Burns filed a Notice of Insufficiency of APS and Pinnacle
25 West Responses to Commissioner Burns' Questions.

26 _____
27 ³¹ Hr'g Tr. vol. I, 19-23 (April 24, 2017).

³² Hr'g Tr. vol. I, 19 (Apr. 24, 2017).

28 ³³ Hr'g Tr. vol. VII, 1315 (May 2, 2017).

On May 25, 2017, Maricopa County Superior Court Judge Kiley held oral argument on APS's Motion to Dismiss in *Commissioner Burns v. APS*.

On May 30, 2017, a Ruling was issued in *Commissioner Burns v. APS* ordering a stay of the proceedings for the Commission to consider a Motion to Compel.

On June 2, 2017, Commissioner Burns filed the Motion to Compel and Motion to Stay.

On June 15, 2017, APS filed its Opposition to the Motion to Compel and Motion to Stay.

Numerous public comments have been filed.

III. Discovery Motions Filed by Commissioner Burns

A. Motion for Disqualification

1. Summary of Briefing

The Motion for Disqualification requests an order suspending these proceedings, facilitating an expeditious and thorough investigation, and requiring disqualification of any Commissioners determined to be "disqualified under constitutional due process standards."³⁴ Commissioner Burns asserts that disqualification is necessary because Commissioners Forese and Little received contributions from independent expenditures in the 2014 Commission elections. According to Commissioner Burns, disqualification is warranted because Pinnacle West refuses to disclose its 2014 political contributions.³⁵ He asserts that Pinnacle West admits it "may use our corporate funds to make independent expenditures or to contribute to organizations engaged in lobbying or political campaign activity or that make independent expenditures at the federal, state or local level, as permitted by law"³⁶ and may have contributed to the independent expenditures Save Our Future Now and Arizona Free Enterprise Club, both of which directed independent expenditure campaigns on behalf of Chairman Forese and Commissioner Little.³⁷ In addition, Commissioner Burns also demands the investigation and possible disqualification of Commissioners Andy Tobin

³⁴ Motion for Disqualification at 2.

³⁵ Motion for Disqualification at 16.

³⁶ Motion for Disqualification at 10.

³⁷ Motion for Disqualification at 11-14. According to the Arizona Secretary of State's website, Chairman Forese received \$290,225 from Save Our Future Now and \$154,197 from Arizona Free Enterprise Club. Commissioner Little received \$291,725 from Save Our Future Now and \$154,197 from Arizona Free Enterprise Club.

1 (“Commissioner Tobin”) and Boyd Dunn (“Commissioner Dunn”) because independent expenditures
 2 from Arizona Coalition for Reliable Electricity, a group funded by Pinnacle West, were directed in
 3 support of their 2016 Commission elections.³⁸ Commissioner Burns admits that he also received
 4 contributions from Arizona Coalition for Reliable Electricity, but suggests the \$1,324,469 directed in
 5 support of his 2016 Commission election was “a crafty, manipulative scheme designed to potentially
 6 cast him as a hypocrite in the eyes of voters. . . .”³⁹ According to the Arizona Secretary of State’s
 7 website, Commissioner Burns also received \$1,065,383 in independent expenditures directed from
 8 Save Our AZ Solar and \$13,697 in independent expenditures directed from SolarCity Corporation, a
 9 company that has intervened in prior Commission cases.⁴⁰

10 The Motion for Disqualification is premised on Commissioner Burns’ belief that
 11 disqualification is necessary to protect the due process rights of the parties to the rate case. He relies
 12 on heavily on *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), as grounds for disqualifying
 13 his fellow Commissioners. Commissioner Burns asserts that the *Caperton* requires investigation and
 14 disqualification where the amount spent creates a “serious risk of actual bias.” 556 U.S. at 884.
 15 According to Commissioner Burns, a serious risk is present when there is a disparity between “the
 16 contribution’s relative size in comparison to the total amount of money contributed to the campaign,
 17 the total amount spent in the election, and the apparent effect that contribution had on the outcome of
 18 the election.” *Id.*

19 APS objected to the disqualification of Chairman Forese and Commissioners Little, Tobin,
 20 and Dunn.⁴¹ APS argues that Commissioner Burns has no standing to assert the due process rights of
 21 the parties to the rate case. It also distinguishes *Caperton* suggesting that the holding only applies to
 22
 23

24 ³⁸ Motion for Disqualification at 21. According to the Arizona Secretary of State’s website, Commissioners Tobin and
 25 Dunn received \$1,324,468 in independent expenditures from Arizona Coalition for Reliable Electricity, a group funded
 by Pinnacle West.

26 ³⁹ *Id.*

27 ⁴⁰ SolarCity Corporation is the primary contributor to Save Our Solar AZ.

28 ⁴¹ Opposition of Arizona Public Service Company to Emergency Motion of Commissioner Robert Burns to Compel
 Compliance with Investigatory Subpoenas (“Opposition to Motion for Disqualification”) at 15-22, 34-37 (Jun. 15,
 2017).

judges, not commissioners engaged in ratemaking.⁴² See *Ariz. Corp. Comm'n v. Super. Ct.*, 107 Ariz. 24, 26 (1971) (ratemaking and rulemaking are legislative acts); *Simms v. Round Valley Light & Power Co.*, 80 Ariz. 145, 154 (1956) (ratemaking requires legislative discretion). In lieu of *Caperton*, APS urges the Commission to adopt the principles in *Hortonville Joint School District v. Hortonville Education Association*, 426 U.S. 482, 488 (1976). In *Hortonville*, the Court held that due process for failing to provide “an independent, unbiased decisionmaker” was not offended when a matter has “significant governmental and public policy dimensions” and is not simply “an adjudicative decision.” *Id.*

Finally, APS asserts that disqualifying Chairman Forese and Commissioners Little, Tobin, and Dunn would eliminate the possibility of a quorum. In such cases, the Rule of Necessity prohibits disqualification and allows all Commissioners to adjudicate the APS rate case.

2. Resolution

Commissioner Burns has not demonstrated that disqualification of Chairman Forese and Commissioners Little, Tobin, and Dunn is required. First, we agree that *Caperton v. A.T. Massey Coal Co.* is distinguishable and does not apply to the Commission while ratemaking. Second, the Rule of Necessity precludes disqualification in these circumstances. See Ariz. Agency Handbook, § 10.9.4.3. (“If a majority of the total membership of a public body is disqualified, thereby making it impossible for the public body to convene a quorum to discuss or decide the matter, the disqualified members may disclose in the public record their reasons for disqualification and proceed to act as if they were not disqualified.” (citing A.R.S. § 38-508(B) and *Nider v. Homan*, 89 P.2d 136, 140 (Cal. App. 1939))).

Finally, Commissioner Burns lacks the standing necessary to disqualify or recuse his fellow Commissioners. Commissioner Burns pursues disqualification for the “protection of parties,” “consumers, the voters, and the public at large.”⁴³ This issue was addressed in *Kerr v. Killian*, 197 Ariz. 213 (App. 2000). The court held that the Arizona Department of Revenue “lacks standing to

⁴² *Id.* at 18-19.

⁴³ Motion for Disqualification at 23.

1 seek reversal on the basis of [inadequate notice to taxpayers] because the right to due process asserted
 2 does not belong to the Department.” *Id.* at 217. Like *Kerr*, Commissioner Burns is seeking to
 3 vindicate due process rights that belong to the parties. None of the parties to the rate case have come
 4 forward to say there is insufficient facts to proceed with ratemaking and Commissioner Burns has no
 5 standing to pursue disqualification.

6 We conclude, consistent with the discussion above, that it is just and reasonable and in the
 7 public interest to deny the Motion for Disqualification.

8 **B. Motion to Compel**

9 1. Summary of Briefing

10 The Motion to Compel asks the Commission to confirm that Commissioner Burns “has
 11 individual authority to issue and enforce the Subpoenas,” “that the remaining Commissioners will not
 12 act upon the objections against the Subpoenas,” and, in absence of the court order, “the Subpoenas
 13 are subject to immediate enforcement.”⁴⁴ He also asks for an order granting the Motion for
 14 Disqualification and the Motion to Question and Admit Counsel to Question.⁴⁵

15 Commissioner Burns argues that the Motion to Compel should be granted because the
 16 Commission cannot interfere with his individual right as a Commissioner to conduct investigations of
 17 a regulated utility and to inspect the books and records of both the utility and their affiliated
 18 companies. *See, e.g.* Ariz. Const., art. XV, §§ 3-4, A.R.S. § 40-241 (“each commissioner” may
 19 conduct inspections of corporate books or examinations under oath of corporate officials), *Ariz. Corp.*
 20 *Comm’n v. Ariz. ex rel. Woods*, 171 Ariz. 286, 290-291 (1992).⁴⁶ He relies upon the “broad
 21 investigatory powers” of a Commissioner.⁴⁷ Commissioner Burns asserts that *Carrington v. Arizona*
 22 *Corporation Commission*, 199 Ariz. 303, 305 (App. 2000), recognized that a Commissioner “can
 23 investigate merely on suspicion that the law is being violated, or even just because [he or she] wants
 24

25 ⁴⁴ Motion to Compel at 2.

26 ⁴⁵ The Motion for Disqualification is discussed in § III(A), *supra*. The Motion to Question and Admit Counsel to
 27 Question is discussed below in § III(C).

28 ⁴⁶ Motion to Compel at 6.

⁴⁷ Motion to Compel at 7.

1 assurance that it is not.”⁴⁸ According to *Carrington*, “the Commission must be free without undue
 2 interference or delay to conduct an investigation which will adequately develop a factual basis for a
 3 determination as to whether particular activities come within the Commission's regulatory authority.”
 4 199 Ariz. at 305.

5 The Motion to Compel also states that the subpoenas are relevant because “the information
 6 sought is central to the Commission's rate-setting authorities. It will confirm the transfer of utility
 7 customer revenues funding between APS and its parent, and just how Pinnacle West relies upon and
 8 uses them for political influence activities, and will provide evidence critical to determining the
 9 manner and extent to which APS's rate requests and rate settlement strategies and decisions,
 10 including calculations and settlement decision-making for the pending request increase, are impacted
 11 and influenced by Pinnacle West's political and other influence-peddling spending and objectives.”⁴⁹

12 Commissioner Burns also asserts the subpoenas do not violate the First Amendment because
 13 “a compelling interest exists - and a subpoena will be enforced regardless of potential First
 14 Amendment issues - where the agency seeking the information is conducting an investigation
 15 pursuant to its statutory authority.”⁵⁰ He distinguishes *Citizens United v. Federal Election*
 16 *Commission*, 558 U.S. 310 (2010), stating an exception exists when the government requires
 17 corporate disclosure. *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F.Supp. 376, 386 (D.Vt. 2012).

18 APS objects to the Motion to Compel, arguing that the subpoenas are not relevant to the rate
 19 case, that Commissioner Burns lacks the authority to compel this information, the subpoenas violate
 20 APS's First Amendment rights, and the subpoenas are intended to harass APS. The Company relies
 21 on the limiting language in *Carrington* to support its arguments on relevance and harassment. APS
 22 argues the subpoenas are not relevant to the rate case because they seek information on expenditures
 23 that were not included in APS's test year expenditures. *See In re Sulphur Springs Valley Electric*
 24 *Coop. Inc.*, Decision 71274 at 7-11, Docket No. E-01575A-08-0328 (Sept. 8, 2009) (Commission
 25

26 ⁴⁸ *Id.* quoting *Carrington*, 199 Ariz. at 305 (internal citations omitted).

27 ⁴⁹ Motion to Compel at 8.

28 ⁵⁰ Motion to Compel at 22, quoting *U.S. v. Inst. for Coll. Access & Success*, 27 F. Supp. ad 106, 115 (D.D.C. 2014) (internal citations omitted).

1 disallowed expenditures for charitable contributions, sponsorships, gifts, meals, and entertainment);
 2 *In re Sunrise Water Co.*, Decision 71445 at 19-21, Docket No. W-02069A-08-0406 (Dec. 23, 2009)
 3 (Commission disallowed lobbying expenses because legislative activities have no direct benefit to
 4 ratepayers). APS did not include charitable, political, or lobbying expenditures in its test year
 5 expenses and the \$2,600,000 in marketing and advertising expenditures were disallowed. Since these
 6 expenditures are not included in expenses, it believes this information is not relevant to ratemaking.
 7 In addition, APS further believes any request for information outside of the 2015 test year is
 8 overbroad and unduly burdensome.

9 The objection also asserts the subpoenas violate APS's First Amendment rights granted in
 10 *Citizens United*. According to APS, in *Citizens United*, "the Supreme Court held that corporations
 11 have a First Amendment right to make independent political expenditures and that "[n]o sufficient
 12 governmental interest justifies limits' on such expenditures."⁵¹ 558 U.S. at 365. APS argues that
 13 Commissioner Burns fails to recognize that "although campaign expenditures that benefit *judges*
 14 could give rise to corruption or the appearance thereof, expenditures benefiting *legislators* could not.
 15 *Id.* at 357."⁵²

16 2. Resolution

17 The Commission finds that the limiting language in *Carrington* applies and the subpoenas are
 18 not relevant to APS's rate case. In *Carrington*, the court cabined in the sweeping power noted by
 19 Commissioner Burns, stating "the Commission may not act unreasonably and may not use its
 20 investigatory powers to harass, intimidate, or defame a business." *Carrington*, 199 Ariz. at 305
 21 (internal citations omitted). The Commission cannot issue a subpoena that is "not within its scope of
 22 authority." *Id.* It cannot enforce an "order that is too vague," or enforce a subpoena that "seeks
 23 irrelevant information," where the "investigation is being used for an improper purpose, such as to
 24 harass." *Id.* The subpoenas seek information that is irrelevant to the rate case and is not reasonably
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27 ⁵¹ Opposition to Motion to Compel at 18.

28 ⁵² *Id.*

1 calculated to lead to the discovery of admissible evidence.⁵³ The record supports a finding that
2 charitable, political, lobbying expenditures were not included in APS's test year expenses, and any
3 marketing or advertising expenditures claimed by APS were disallowed. The subpoenas are
4 overbroad and unduly burdensome in so much as they seek charitable, political, lobbying, marketing,
5 or advertising expenditures for the years 2011 through 2016. The rate case uses a test year of 2015,
6 anything requested outside of the test year is irrelevant.

7 Since the subpoenas are irrelevant, it is not necessary for the Commission to reach the issues
8 of (1) whether a Commissioner has the authority and jurisdiction to subpoena the information from
9 APS, Pinnacle West, and Mr. Brandt on these topics, (2) whether the subpoenas violate APS's First
10 Amendment rights under *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), (3)
11 whether the subpoenas constitute harassment, and (4) whether the threat of publication to third parties
12 defeats the subpoenas.

13 The Commission recognizes the importance of exploring the external influences on
14 Commissioners. Indeed, the issue will be explored in Commissioner Dunn's Code of Ethics docket,
15 but the Commission recognizes that rate cases and policy development are separate functions. While
16 they overlap in certain respects, Commissioner Burns' subpoenas blur the lines between ratemaking
17 and policymaking. If the Commission wishes to pursue information from a public service
18 corporation regarding their charitable, political, lobbying, marketing, and advertising expenditures it
19 must adopt lawful policy that was developed outside of a ratemaking docket and will protect the
20 rights of all parties involved. APS's rate case is not the appropriate place to develop or implement
21 such a policy.

22 We conclude, consistent with the discussion above, that it is just and reasonable and in the
23 public interest to deny the Motion to Compel.

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27 ⁵³ The Administrative Law Judge denied a separate motion to compel in this proceeding filed by EFCA for failing to
28 demonstrate relevance, for being overbroad, and for failing to demonstrate that the request is reasonably calculated to
obtain admissible evidence. *See* Procedural Order (Dec. 13, 2016).

1 **C. Motion to Question and Admit Counsel to Question**

2 1. Summary of Briefing

3 The Motion to Question and Admit Counsel to Question suggests “the [administrative law
4 judge’s] refusal to act on Commissioner Burns’ request to call witnesses and to assist in their
5 questioning is unconstitutional” and that Commissioner Burns can call his list of witnesses and utilize
6 his personal counsel to assist in the questioning those witnesses. Commissioner Burns announced his
7 intent to call a number of APS/Pinnacle West witnesses that were not scheduled to appear during the
8 Prehearing Conference. He instructed the parties that he would appear on April 27, 2017, to question
9 employees of APS/Pinnacle West including, Mr. Brandt; Denise Danner, Controller and Chief
10 Accounting Officer; James Hatfield, CFO, Robert Aiken, Vice President, Federal Affairs, Jessica
11 Pacheco, Vice President, State and Local Affairs; and, Barbara Lockwood, Vice President,
12 Regulation.⁵⁴ He also filed the Request of Commissioner Robert Burns for Questioning of APS and
13 Pinnacle West Witnesses (“Request for Witnesses”) that included several pages of topics and
14 questions for these witnesses.⁵⁵ These topics and questions seek the same information as the
15 subpoenas with minor revisions. Commissioner Burns sought witness testimony regarding the
16 political activities, marketing efforts, lobbying activities, charitable events, sponsorships, and civic
17 engagements of APS.⁵⁶ He wanted information about “forward-looking statements” like forecasting
18 and estimates for APS’s future revenue, earnings, net income, dividend, and return on equity.⁵⁷ He
19 also sought targeted information related to the disqualification of commissioners. For example,
20 Commissioner Burns intended to ask how decisions regarding campaign contributions were
21 determined and he wanted the identity of employees who have “ever met or communicated with any
22 of the Commissioners currently hold office the Arizona Corporation Commission.”⁵⁸ Despite his

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25 ⁵⁴ Correspondence from Commissioner Burns (April 21, 2017).

26 ⁵⁵ Request for Witnesses (April 24, 2017); Prehr’g Conference Tr. 43-44 (Apr. 21).

27 ⁵⁶ *Id.* at 3.

28 ⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 7-9.

1 passion during the Prehearing Conference, Commissioner Burns never appeared to question the
2 witnesses on April 27, 2017, or any portion of the hearing.⁵⁹

3 In his Motion to Question and Admit Counsel to Question, Commissioner Burns again relies
4 on *Carrington* to allow him “wide berth” in calling and questioning witnesses from APS and
5 Pinnacle West.⁶⁰ 199 Ariz. at 305. He also contends a majority vote of the Commission do not have
6 the authority to stop him from calling and questioning witnesses at the hearing.⁶¹ He derives this
7 conclusion from the Commission procedural rules that provide for hearings “to be held before one or
8 more Commissioners, one or more hearing officers, or any combination thereof,” and allow the
9 presiding officer or Commissioners to examine witnesses and take depositions. *See* Ariz. Admin.
10 Code R14-3-109(A), R14-3-109(G), R14-3-109(F); A.R.S. § 40-244(A). Commissioner Burns relies
11 on a policy argument to support his request to admit his personal counsel to question the witnesses.
12 He states that he needs counsel in order to ask “the necessary follow-up questions,” and this
13 assistance is very similar to the role of a Commission policy advisor during Open Meetings and Staff
14 Meetings.

15 In its Objection to Commissioner Burns’ Demand for Testimony, APS asks the Commission
16 to deny the motion on the grounds that APS has already responded and produced all information for
17 the requests that are relevant to the rate case, and any outstanding requests seek information that is
18 irrelevant to the issues in the rate case. APS suggests that the requests seeking information about
19 Pinnacle West are irrelevant because Pinnacle West is not the applicant or a party to the rate case.⁶²
20 Inquiries outside of the 2015 test year or related to charitable, political, or lobbying expenditures are
21 also irrelevant because they have not been claimed as expenses in the rate case.⁶³

22 APS also provided a detailed analysis of its responsive productions. Over the last few years,
23 APS has responded to Commissioner Burns’ information requests in seven different dockets
24

25 ⁵⁹ Hr’g Tr. vol. VII, 1315 (May 2, 2017).

26 ⁶⁰ Motion to Question and Admit Counsel to Question at 4.

27 ⁶¹ *Id.* at 4.

28 ⁶² Objection to Commissioner Burns’ Demand for Testimony at 5.

⁶³ *Id.* at 5-8.

1 including APS's net metering case, its prior rate case, Commissioner Burns' campaign contribution
2 docket, the T&D docket, and the influence on electricity regulation in Arizona docket.⁶⁴ APS has
3 produced information in response to Commissioner Burns' requests nine times in the last four years.⁶⁵
4 Those productions included general ledgers, FERC accounts, political contributions, charitable
5 donations, dues, advertising and lobbying expenditures.⁶⁶

6 2. Resolution

7 The Commission adopts and incorporates the preceding section regarding Resolution of the
8 Motion to Compel, § III(B)(2), *supra*, into this Resolution of the Motion to Question and Admit
9 Counsel to Question, § III(C)(2). Commissioner Burns admits "the purpose [of a hearing] is to get to
10 the relevant facts, whether APS [or Commissioner Burns] likes them or not."⁶⁷ The evidence supports
11 a finding that the questions contained in the Request for Witnesses are overly broad, irrelevant to the
12 rate case, and not reasonably calculated to lead to the discovery of admissible evidence. APS has
13 already produced nine separate responses to these issues and states that it has disclosed all responsive
14 information that is relevant to the rate case. Commissioner Burns seeks information that is outside the
15 2015 test year, that APS never claimed as part of their expenses (charitable giving, campaign
16 contributions, and lobbying expenses), and that was disallowed (marketing and advertising
17 expenditures). Commissioner Burns also failed to appear at the time he set for the questioning of
18 these witnesses. For these reasons, the Motion to Question fails.

19 It is not necessary for the Commission to reach the merits of Commissioner Burns' request to
20 Admit Counsel to Question. In light of the Commission's denial of the Motion to Question, the
21 reasons to admit Commissioner Burns' counsel no longer exist, the issue is moot, and the
22 Commission declines to address the merits of his request at this time.

23 We conclude, consistent with the discussion above, that it is just and reasonable and in the
24 public interest to deny the Motion to Question and Admit Counsel to Question.

25 _____
26 ⁶⁴ *Id.* at 3-4.

27 ⁶⁵ *Id.* at Ex. A.

28 ⁶⁶ *Id.*

⁶⁷ Motion to Question and Admit Counsel to Question at 9.

D. Motion to Stay

Commissioner Burns requests that the entire rate case be stayed until the investigation into APS's records is completed. We note that a stay would likely prolong the rate case proceedings beyond August 2017, the deadline to complete the proceedings as prescribed in the Commission's rules.⁶⁸ Given our dispositions on the Motion for Disqualification, Motion to Compel, and Motion to Question and Admit Counsel to Question, the reasons for the stay no longer exist, the issue is moot, and the Commission declines to address the merits of his request at this time.

We conclude, consistent with the discussion above, that it is just and reasonable and in the public interest to deny the Motion to Stay.

* * * * *

Having considered the entire record and being fully advised in the premises, the Commission finds, concludes, and orders that:

FINDINGS OF FACT

Commissioner Burns' believes that disqualification is necessary to protect the due process rights of the parties to the rate case.

Commissioner Burns does not challenge the integrity of the Commissioners, he challenges the integrity of APS.

He tells groups that Chairman Forese and Commissioner Little were unaware of where the independent expenditure money from the 2014 election came from until after the election.

Commissioner Burns could not point to any evidence, but argued that "a lot of people" told him that it was "not a wild goose chase and that I should proceed." He urged the Commission to give this investigator a chance and he might be able to find that evidence.

⁶⁸ See Ariz. Admin. Code R14-2-103(B)(11)(d) ("The Commission shall issue a final order that disposes of all issues involved in all parts or phases of proceeding within [360 days] from the date that a filing is accepted" for Class A utilities). APS's filing was accepted July 1, 2016 and the Company agreed to a 30 day stay of the proceedings to allow a related docket to proceed.

1 Commissioner Burns admits that he also received contributions from Arizona Coalition for
2 Reliable Electricity, but suggests the \$1,324,469 directed in support of his 2016 Commission
3 election.

4 According to the Arizona Secretary of State's website, Commissioner Burns also received
5 \$1,065,383 in independent expenditures directed from Save Our AZ Solar and \$13,697 in
6 independent expenditures directed from SolarCity Corporation, a company that has intervened in
7 prior Commission cases.

8 Disqualifying Chairman Forese and Commissioners Little, Tobin, and Dunn would eliminate
9 the possibility of a quorum.

10 None of the parties to the rate case have come forward to say there is insufficient facts to
11 proceed with ratemaking.

12 The issue of external influences on Commissioners will be explored in Commissioner Dunn's
13 Code of Ethics docket.

14 Inquiries outside of the 2015 test year or related to charitable, political, or lobbying
15 expenditures are also irrelevant because they have not been claimed as expenses in the rate case.

16 APS has already produced nine separate responses to these issues and states that it has
17 disclosed all responsive information that is relevant to the rate case.

18 Commissioner Burns seeks information that is outside the 2015 test year, that APS never
19 claimed as part of their expenses (charitable giving, campaign contributions, and lobbying expenses),
20 and that was disallowed (marketing and advertising expenditures).

21 Commissioner Burns announced his intent to call a number of APS/Pinnacle West witnesses
22 that were not scheduled to appear during the Prehearing Conference. He instructed the parties that he
23 would appear on April 27, 2017, to question employees of APS/Pinnacle West.

24 Commissioner Burns sought witness testimony regarding the political activities, marketing
25 efforts, lobbying activities, charitable events, sponsorships, and civic engagements of APS.

26 He wanted information about forward-looking statements like forecasting and estimates for
27 APS's future revenue, earnings, net income, dividend, and return on equity.

28

1 He also sought targeted information related to the disqualification of commissioners. For
2 example, Commissioner Burns intended to ask how decisions regarding campaign contributions were
3 determined and he wanted the identity of employees who have ever met or communicated with any of
4 the Commissioners currently hold office the Arizona Corporation Commission.

5 Despite his passion during the Prehearing Conference, Commissioner Burns never appeared
6 to question the witnesses on April 27, 2017, or any portion of the hearing.

7 Commissioner Burns states that he needs counsel in order to ask the necessary follow-up
8 questions.

9 The reasons to admit Commissioner Burns' counsel no longer exist.

10 We note that a stay would likely prolong the rate case proceedings beyond August 2017, the
11 deadline to complete the proceedings as prescribed in the Commission's rules.

12 The reasons for the stay no longer exist

13 **CONCLUSIONS OF LAW**

14 1. APS is a public service corporation within the meaning of Article XV of the Arizona
15 Constitution and A.R.S. §§ 40-203, 40-204, 40-221, 40-250, 40-251, 40-361, and A.A.C. R14-2-801,
16 *et seq.*

17 2. The Commission has jurisdiction over APS and the subject matter of its Application
18 and the Motions filed as part of the Application proceedings.

19 3. Notice and an opportunity to be heard on the Motions was provided in accordance
20 with the law.

21 4. Commissioner Burns is seeking to vindicate due process rights that belong to the
22 parties.

23 5. Commissioner Burns lacks the standing necessary to disqualify or recuse his fellow
24 Commissioners.

25 6. *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868 (2009), is distinguishable and
26 does not apply to the Commission while performing its legislative ratemaking function.

27 7. The Rule of Necessity prohibits disqualification and allows all Commissioners to
28 adjudicate the APS rate case.

8. *Carrington v. Arizona Corporation Commission*, 143 Ariz. 219 (App. 1984), applies as to its holdings related to relevance.

9. The subpoenas seek information that is not relevant to the rate case.

10. The subpoenas are overbroad and unduly burdensome and seek information outside of the 2015 test year.

11. Commissioner Burns's Motion to Question, including the proposed questions and demand for witnesses are not relevant to the rate case.

12. Commissioner Burns's Motion to Question, including proposed questions and demand for witnesses are overbroad and unduly burdensome and seek information outside of the 2015 test year.

13. Commissioner Burns' request to Admit Counsel to Question is moot in light of the ruling on the Motion to Question.

14. The Motion to Stay is moot in light of the rulings on the Motion for Disqualification, Motion to Compel and Motion to Question and Admit Counsel to Question.

ORDER

IT IS THEREFORE ORDERED that the Commission hereby denies Commissioner Burns' Motion for Determination of Disqualification and for Stay of Proceedings Pending Full Investigation.

IT IS FURTHER ORDERED that the Commission hereby denies the Emergency Motion of Commissioner Robert Burns to Compel Compliance with Investigatory Subpoenas.

IT IS FURTHER ORDERED that the Commission hereby denies the Emergency Motion of Commissioner Robert Burns for Relief (1) Confirming That the Administrative Law Judge Will Facilitate Calling and Questioning of Hearing Witnesses; and (2) Approval of His Counsel Participating in Questioning.

IT IS FURTHER ORDERED that the Commission hereby denies the Emergency Renewed Motion of Commissioner Robert Burns for Relief Staying These Rate-Making Proceedings.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

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CHAIRMAN FORESE

COMMISSIONER DUNN

COMMISSIONER TOBIN

COMMISSIONER LITTLE

COMMISSIONER BURNS

IN WITNESS WHEREOF, I, TED VOGT, Executive Director of
the Arizona Corporation Commission, have hereunto, set my
hand and caused the official seal of this Commission to be affixed
at the Capitol, in the City of Phoenix, this _____ day of
_____, 2017.

TED VOGT
EXECUTIVE DIRECTOR

DISSENT: _____

DISSENT: _____

On this 20th day of June, 2017, the foregoing document was filed with Docket Control as a Correspondence From Commissioner, and copies of the foregoing were mailed on behalf of Boyd Dunn, Commissioner - A.C.C. to the following who have not consented to email service. On this date or as soon as possible thereafter, the Commission's eDocket program will automatically email a link to the foregoing to the following who have consented to email service.

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